

Presentation to Water Resource Mitigation Task Force

Foster Decision Refresher

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**We manage water resources to meet the needs
of people and the natural environment, in
partnership with Washington communities.**



WATER for PEOPLE, FARMS & FISH

Overview

- *Postema* and *Foster* decisions
- Implications on water resource management
- Types of water right decisions impacted



Postema decision (2001)

Appeal of a batch denial of applications to withdraw groundwater in hydraulic continuity with closed surface water

- Instream flow rights are rights subject to the same protection as other water rights
- No impairment to existing rights are permissible, even *de minimis* impairment
- “Any effect on the flow or level of the surface water” in closed streams would mean impairment



Foster decision (2015)

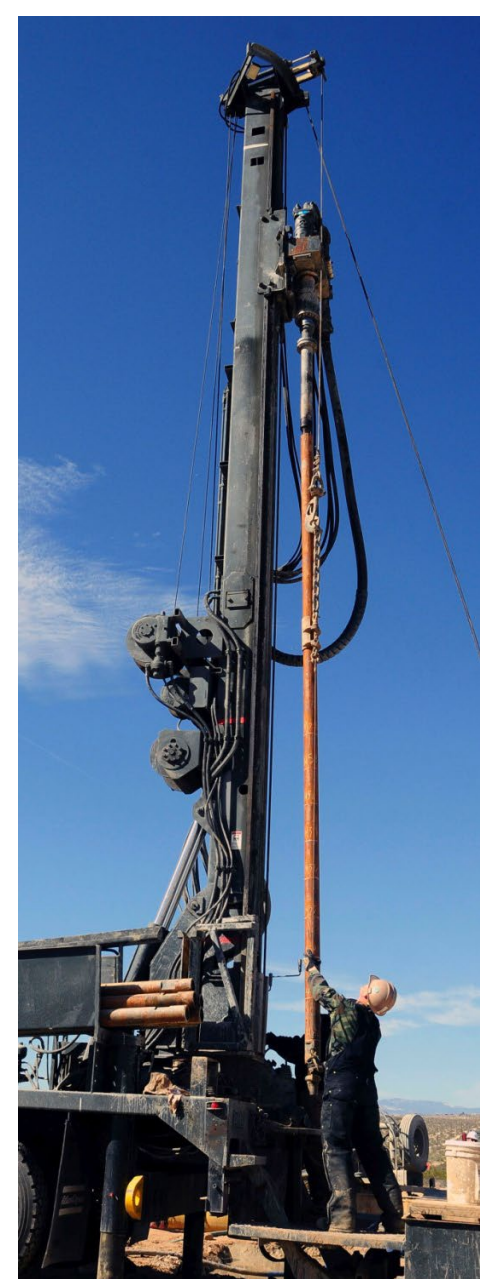
- Application for municipal groundwater permit
- Part of regional joint effort between Olympia, Lacey, and Yelm
- Ms. Foster appealed Ecology's approval of the of Yelm permit decision to the PCHB
- PCHB upheld Ecology's decision
- After appeals, the Supreme Court overturned permit approval for Yelm's water right



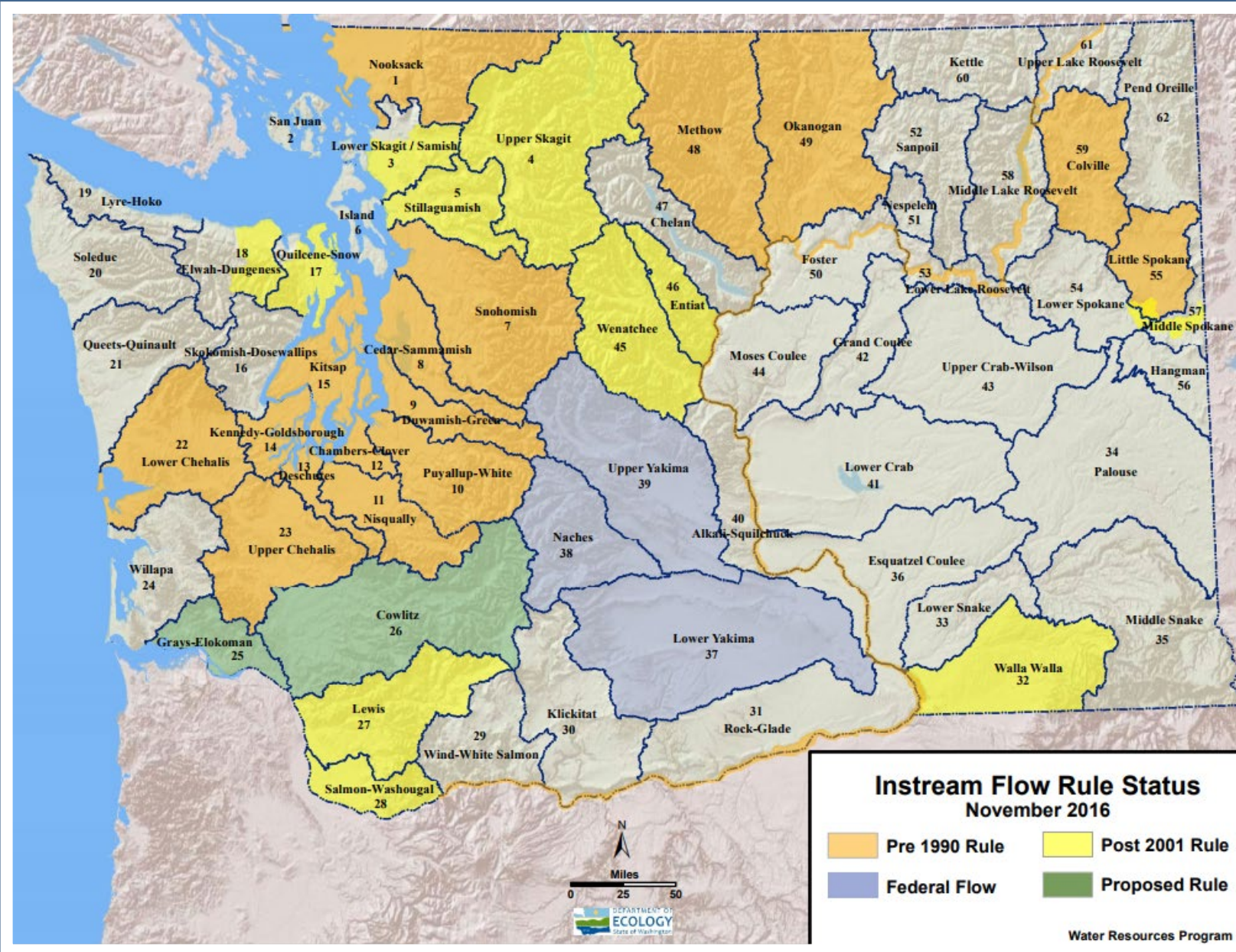
Foster holdings

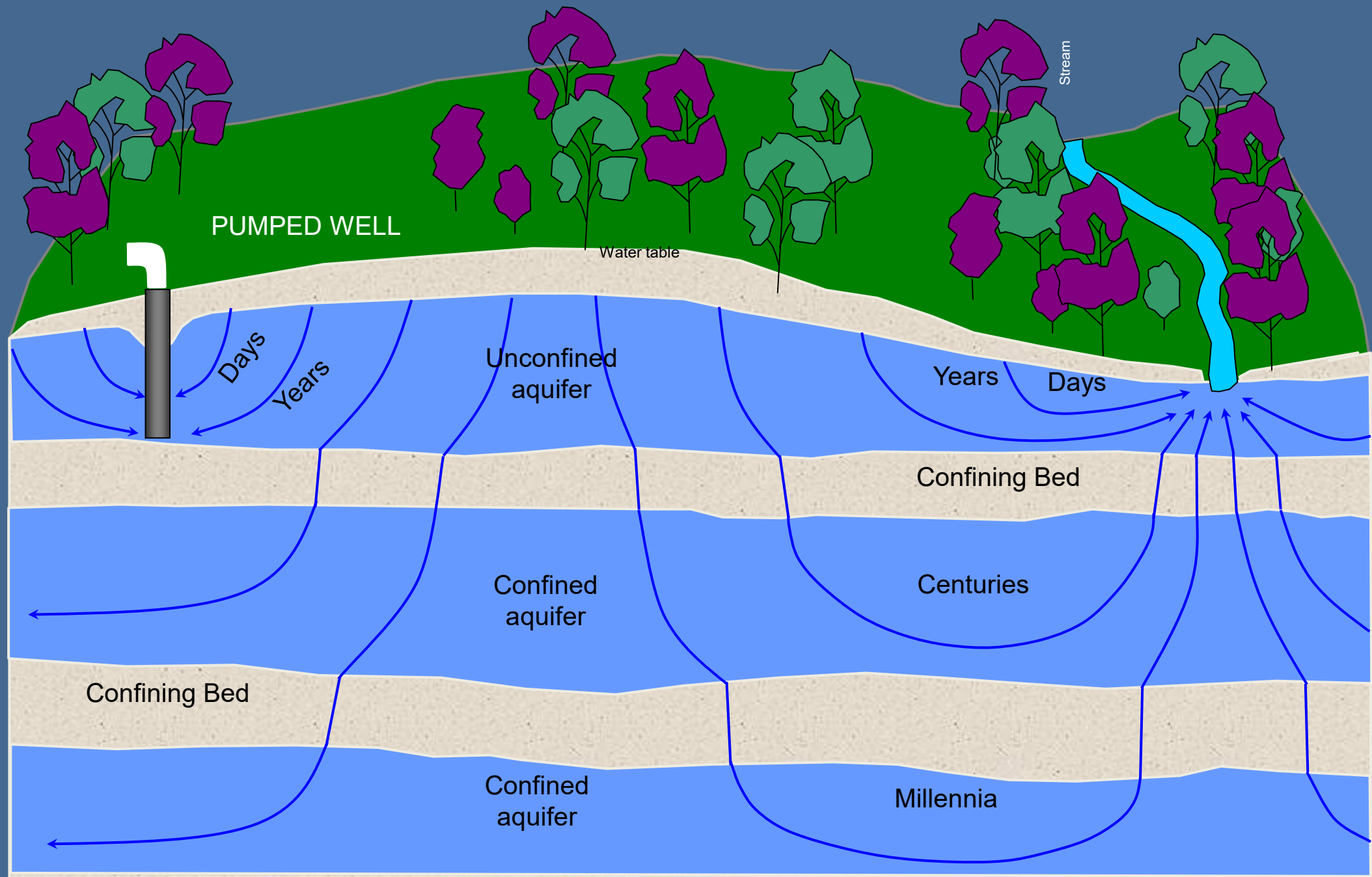
Flow impairment must be mitigated with flow

- Supreme Court rejected use of out-of-kind mitigation even if it provides “ecological benefit”
- “Legal injury” to adopted instream flows when a new appropriation would impact flows below minimum levels; *de minimis* impairment meets this threshold
- Overriding consideration of the public interest (OCPI) cannot be invoked for any permanent impairment of adopted instream flows



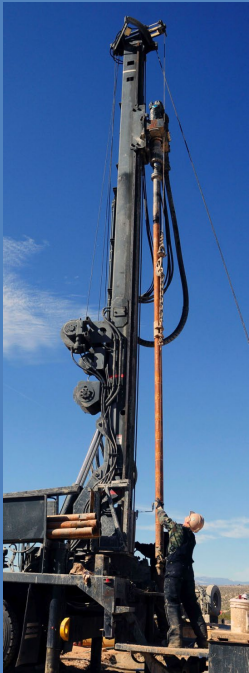
Instream Flow Rules In Washington





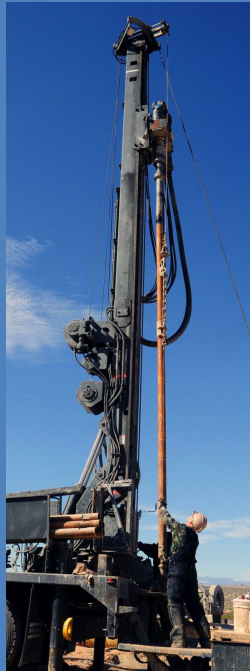
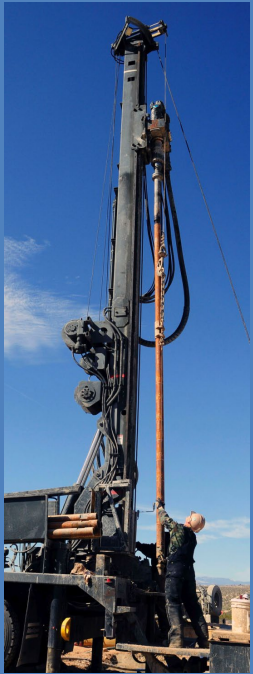
Types of decisions affected: New withdrawals

New Well to be constructed



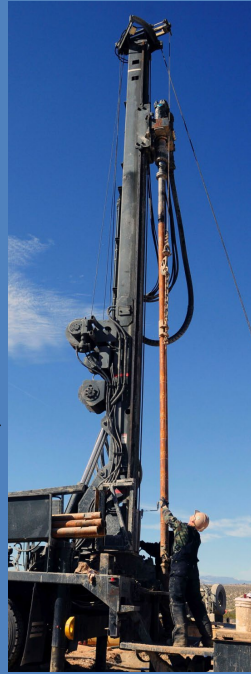
Types of decisions affected: groundwater right changes

Water right changes



Types of decisions affected: surface to groundwater right changes

Water right changes





Thank you for your time!

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